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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In re

Petition for Declaratory
Ruling or, in the Alternative,
for Rulemaking to Determine
Whether Competitive Bidding
Should Be Used to License
Certain Cellular
Rural Service Areas

RM-8897

To: The Commission

REPLY COMMENTS

Thomas Domencich and the Committee for a Fair Lottery (collectively, "CFL"), by their attorneys and pursuant to the Commission's Public Notice, DA 96-1685, released October 24, 1996, hereby reply to the Comments filed November 25, 1996 in the above-captioned proceeding, which addresses the Petition for Declaratory Ruling, or, in the Alternative, for Rulemaking filed by Cellular Communications of Puerto Rico, Inc. ("CCPR") on September 9, 1996. The following is respectfully shown:

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**I. The Limited Support for Auctions
of Unlicensed RSAs Is Not Well-Reasoned**

1. Only two commenters^{1/} expressed support for CCPR's Petition, which asks the Commission to hold an auction, rather than a relottery, for the Puerto Rico 5 - Ceiba RSA, in which the original lottery winner's application was found to be defective. Western and BANM both assert that auctions should be held for all remaining RSAs for which permanent authority has not been granted. According to these commenters, auctions alone -- but not lotteries -- "will achieve the Commission's public interest goals."^{2/} This fallacious proposition ignores Congressional intent, Commission precedent, and the unique circumstances of the remaining unlicensed cellular RSAs.

2. The "Special Rule"^{3/} included by Congress in the 1993 Budget Act to govern pending applications serves as an explicit recognition that the public interest is not served by retroactively subjecting applicants on file prior to July 26, 1993 to new licensing procedures. As noted by

^{1/} See Comments of Western Wireless Corporation ("Western") and Bell Atlantic NYNEX Mobile, Inc. ("BANM").

^{2/} Comments of BANM at 5; accord, Comments of Western at 4-5.

^{3/} Consolidated Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(e), 107 Stat. 382 (1993) ("1993 Budget Act").

commenters in this proceeding,^{4/} both the language of the Special Rule and the intent of the drafters reflect Congress' awareness that applications were pending at the time of passage of the 1993 Act^{5/} and its determination that such applications be accorded treatment consistent with other applications filed under the same rules. To do otherwise would be to unreasonably and inequitably treat similarly situated applicants differently simply because the original lottery winner was defective.

3. BANM and Western also ignore relevant Commission precedent. As CFL's Comments showed, the Commission consistently has determined that the public interest would be served by holding lotteries for applications filed prior to July 26, 1993.^{6/} Notably, none of the proceedings cited by BANM for the proposition that the public interest always is served by the use of auctions^{7/} involved pending applications filed prior to July 26, 1993, and, consequently, in those cases the Commission's licensing options were circumscribed by the auction statute. While CFL agrees with BANM that auctions

^{4/} See, e.g., Comments of Committee to Preserve Lottery Selection at 7.

^{5/} Cellular RSA applications were filed in 1988 and 1989, several years before passage of the 1993 Budget Act.

^{6/} See CFL Comments at 12-17.

^{7/} Comments of BANM at 6.

may be the most efficient mechanism for issuing licenses in certain circumstances (e.g., PCS), this is not such a case.

4. BANM and Western erroneously assert that an auction would result in speedier and more efficient licensing.^{8/} With respect to unlicensed cellular RSAs, there is no basis for this claim.^{9/} BANM and Western ignore the fact that the Commission itself is principally responsible for the fact that some RSAs remain unlicensed. Several of the markets for which a lottery was announced in July, 1996 have been ripe for relottery for years -- even before the Commission received auction authority from Congress.^{10/} Auctioning licenses for these RSAs would result in more delay because the Commission does not have in place, and has not proposed, auction rules for cellular RSA licenses. And, as at least one commenter notes, even more delay would result from the certain litigation that would

^{8/} Comments of BANM at 6; Comments of Western at 7-8.

^{9/} In any event, it has become apparent that even in situations where the Commission has no alternative to auctions, significant licensing delays can result. Several auctions have been plagued by delays and defaults by winning bidders. For example, the Commission's auction of C Block PCS licenses, announced in December 1994, did not begin until December 1995. To date, defaults have occurred on nearly 10% of the C Block licenses auctioned.

^{10/} See Comments of Committee to Preserve Lottery Selection, at n.15.

follow a Commission decision to auction the RSA licenses to the detriment of long-pending applicants.^{11/}

5. Because the public interest so clearly does not support their position, parties in support of auctions resort to ad hominem attacks on pending applicants. According to Western, "it is unlikely that an individual application with no industry background other than its single application can rapidly provide quality services...."^{12/} The Commission should give no credence to overly broad generalizations such as this^{13/} that impugn the bona fides of all pending RSA applicants. Reasoned decisionmaking and considerations of equity preclude the Commission from questioning the legitimate public service objectives of all applicants based on anecdotal reference to a handful of dismissed applicants.^{14/} In truth, the pending applicants include experienced communications

^{11/} See Comments of Telephone and Data Systems, Inc. ("TDS") at 7. See also Comments of Committee to Preserve Lottery Selection at 2; Comments of RSA Operators Group at 12.

^{12/} Comments of Western at 6.

^{13/} See also Comments of BANM at 5, 9, 11; CCPR Petition at 5.

^{14/} CFL does not dispute that a number of winners of the Commission's original lotteries were unqualified. In fact, CFL has spent more than \$1 million investigating and prosecuting claims that resulted in the disqualification of lottery winners. The fact that the interests of other serious, bona fide applicants were prejudiced by the participation of defective applicants is overlooked by CCPR, BANM, and Western.

companies and individuals with substantial cellular operating experience. CFL's membership includes persons and companies with diverse interests in well-established cellular systems. The commenters in support of relotteries include other established operators, including TDS and Price Cellular Communications. Price notes in its comments in support of relotteries that it has "consistently used profits it realized [from the sale of RSA permits] to reinvest in the cellular industry," and now owns and operates more than 20 cellular systems, with minority interests in other systems.^{15/}

6. Finally, in evaluating the arguments in support of auctions, the Commission must note that Western, like CCPR,^{16/} has been granted interim operating authority ("IOA") by the Commission to provide cellular service to RSAs for which the Commission has not yet issued a grant of permanent authority, and thus has been and continues to be a beneficiary of the Commission's delay in holding relotteries. Western now seeks a permanent right to the market -- which is completely at odds with the conditions that the Commission placed on IOA holders in the first

^{15/} See Comments of Price Communications Cellular, Inc. at 2-3. Other lottery-winning licensees also support relotteries. See, e.g., Comments of TDS; RSA Operators Group; Applicants Against Lottery Abuse; JMC Enterprises, SDK Enterprises, Donald J. Kunkle, and Formula I Cellular; and Crystal Communications Systems.

^{16/} See discussion infra at ¶ 8.

place. To CFL's knowledge, the Commission consistently has required IOA recipients to dismiss any pending application for permanent authority in the same market, in order to avoid giving one competing applicant a preferred position vis-a-vis other mutually exclusive applicants. Western and CCPR now seek to eviscerate this explicit IOA condition by urging the Commission to convert to an auction process in which they would participate.^{17/} The Commission should not reward gamesmanship of this nature.

II. CCPR's Ex Parte Rule Violations Warrant Immediate Sanction

7. The Commission has acknowledged that CCPR violated explicit rules governing ex parte communications. Several commenters, including CFL, have noted the inequities resulting from the Commission's decision to postpone the scheduled lotteries at the behest of CCPR, and have urged the Commission to take corrective action, including dismissal of the Petition.^{18/}

8. In its initial Comments in this proceeding, CFL chronicled CCPR's (to date) successful attempt to delay the RSA auction by disregarding the Commission's rules

^{17/} Allowing IOA holders to participate in an auction would be patently unfair because the authority previously granted by the Commission would alter the economics of the market in their favor and skew the auction process.

^{18/} Comments of CFL at 6-12; RSA Operators Group at 16; Applicants Against Lottery Abuse at 15; Crystal Communications at 10-12.

governing ex parte contacts. Other parties correctly pointed out the fact that CCPR, through a subsidiary, holds an IOA for the Puerto Rico 5 RSA. This important information apparently was not disclosed by CCPR in the meetings that took place in August 1996 between CCPR's representative and advisors to three of the four Commissioners. It also was not disclosed in written materials distributed by CCPR to Commission staff prior to September 9.

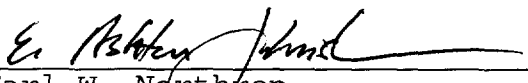
9. CCPR's failure to disclose its IOA during its ex parte contacts with decisionmaking Commission personnel is particularly inexcusable. CCPR has a vested interest in delaying the permanent licensing of the Puerto Rico - 5 RSA license indefinitely while it continues to garner revenues from its "temporary" facilities in the market. Under these circumstances, the Commission should accept the recommendations to dismiss CCPR's Petition summarily and reinstate the lottery on an expedited basis.

WHEREFORE, the foregoing premises duly considered, CFL requests that the Commission proceed without further delay consistent with CFL's Comments and Reply Comments in this proceeding.

Respectfully submitted,

THOMAS DOMENCICH

THE COMMITTEE FOR A FAIR LOTTERY

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December 10, 1996

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CERTIFICATE OF SERVICE

I, Cheri Skewis, a secretary with the law firm of Paul, Hastings, Janofsky & Walker LLP, hereby certify that I have on this 10th day of December, 1996 caused a true and correct copy of the foregoing Reply Comments of Thomas Domencich and the Committee for a Fair Lottery to be delivered via first class mail, U.S. postage prepaid, to the following:

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